



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 40 OF 2017

MOHAMMED ABDI HILLOW.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From The Conviction and Sentence In Wajir SPM Criminal Case No: 2 of 2017 by Mugendi Nyaga–RM)

JUDGMENT

1. The appellant was charged in the magistrate's court at Wajir with defilement Contrary to Section 8 (1) as read with Section 8 (3) of The Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on an unknown date of the month of April, 2016 in Wajir East Sub- County within Wajir County, intentionally and unlawfully caused his penis to penetrate the vagina of R. M. J (name withheld) a child aged 14 years.
2. He denied the charge, and after a full trial he was convicted and sentenced to serve 20 years imprisonment.
3. He has now come to this court on appeal filed through counsel Kamende & Company advocates, raising several grounds of appeal which are seventeen(17) in number.
4. At the hearing of the appeal Ms. Kamende learned counsel for the appellant made long submissions and relied on several case authorities. Counsel submitted firstly that, the language used at the trial was not clear. Secondly that no voire –dire examination by the court of the minor complainant was conducted.
5. Counsel also argued that the age of the complainant, which was a very important ingredient of the offence, was not established. Counsel further submitted that there were contradictions on exactly what occurred from the Prosecution witnesses.
6. Counsel also submitted that the trial court made conclusions in the judgment which were not supported by the evidence in that the finding of the identity of the Toyota vehicle was not based on the evidence.
7. Counsel lastly submitted that the alibi defence of the appellant was not considered by the trial court.
8. Mr. Okemwa the learned Principal Prosecuting Counsel submitted that voire –dire the examination by the court only required when the witness was a child of tender years that is less

than **11** years and the complainant was 14 years. Counsel submitted that the age of the complainant was established by the evidence tendered, and the place of the incident, the vehicle used, as well as the identity of perpetrator of the offence who was her neighbor, was established.

9. This being a first appeal, I am required to re-evaluate the evidence on record and come to my own conclusions and inferences. I have to bear in mind that I did not have the opportunity to see witnesses testify, and determine, their demeanor, and give due allowance to that fact. See the case of: **Okeno -vs- Republic (1972) EA 32.**

10. I will start with the technical points. Firstly the voire –dire examination of the Complainant by the court.

11. Voire - dire examination was not done though the complainant was said to be aged 14 years. It is true that the Children’s Act defines children of tender years to be those to be below the age of **11** years, as stated by Mr. Okemwa. However, courts have, in order to clear any possible doubts, put witnesses below 18 years of age, through this kind of examination. In my view it should have been done in the present case.

12. I turn to the issue of language. The language of the court on 27th January, 2017 was stated to be English/Somali. Such entry also appears on other days of the proceeding but does not appear on some days. The appellant was fully represented at the trial by Mr. Wanyoike. In my view the appellant understood the language used in court, whether it was Somali or not Somali language. From the record it is clear that on all days when evidence was tendered there was a Somali interpreter. I dismiss that complaint.

13. With regard to proof of age of the complainant, in my view it was not proved beyond reasonable doubt. The complainant said she was 14 years. The mother PW2 A H said she was 14 years. She did not give information, about her date of birth. The birth certificate relied upon was dated 31st January, 2017, which it means it was prepared just for the purposes of this case. I hold that age of the complainant was not proved.

14. I now turn to the incident. The only witness who testified about the alleged sexual penetration is the complainant PW1. She is also the only person who testified about the identity as the appellant as the culprit.

15. There is no doubt that the appellant was known as a neighbor by the complainant. Section 124 of The Evidence Act (Cap 80) does not require corroboration of the evidence of a single victim witness of a sexual offence. However, that evidence has to be believable and believed for reasons to be stated by the court.

16. The complainant did not report the incident to anybody for several months. It was only because her mother discovered that she was pregnant, that she alleged that she had been defiled by the appellant. In my view, such conduct by PW1 was far from conduct believable that of a truthful person. In my view she could as well implicated the appellant as a next door neighbor, as an easy way to push away pressure of her mother and from herself. It might or might not be true, that the appellant defiled the compliant. However, the standard of proof required in criminal cases is beyond reasonable doubt. Since the evidence of the complainant, a single witness, is not believable, the benefit of that doubt created should have been given to the appellant, which I hereby do.

17. Consequently and for the above reasons, I find that this appeal has merit. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated, signed and delivered at Garissa this 20th day of April, 2018

George Dulu

JUDGE